

The Honorable Robert S. Lasnik



04-CV-01654-ORD

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PACIFIC SOUND RESOURCES, a
Washington non-profit corporation; and THE
PORT OF SEATTLE, a Washington municipal
corporation,

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY, a
Delaware corporation; J.H. BAXTER & CO., a
California limited partnership; J.H. BAXTER &
CO., a California corporation; and J.H.
BAXTER & CO., INC., a California
corporation,

Defendants.

No. C04-1654L

STIPULATION AND AGREEMENT TO
DISMISS WITH PREJUDICE ALL
CLAIMS, CROSS-CLAIMS, AND
COUNTERCLAIMS ASSERTED BY OR
AGAINST J.H. BAXTER & CO.

The parties to this case, plaintiffs Pacific Sound Resources (PSR) and the Port of Seattle (Port); defendants J. H. Baxter & Co., a California limited partnership, J.H. Baxter & Co., a California corporation, and J. H. Baxter & Co., Inc., a California corporation (collectively Baxter); and defendant The Burlington Northern and Santa Fe Railway Company (BNSF), by and through their counsel of record, stipulate and agree that the provisions which follow are fully binding as a private agreement as well as a stipulated agreement to be filed in the above-captioned court and/or in King County Superior Court if this case, or any claim in this case, is

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FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

1 remanded to that court, or upon remand of the "State Court Action" (defined below) to that
2 court. The parties jointly state:

3 1. Plaintiffs have entered into a settlement agreement with Baxter resolving all
4 issues between them and agreeing to the dismissal, with prejudice and without costs, of all
5 claims with respect to each other. In addition to resolving their claims against each other in this
6 case, the settlement agreement resolves all claims of plaintiffs and Baxter with respect to each
7 other in the related state court case *Pacific Sound Resources and the Port of Seattle v. The*
8 *Burlington Northern and Santa Fe Railway Company, et al.*, filed in 2002 in King County
9 Superior Court (the State Court Action). The Superior Court dismissed plaintiffs' claims
10 against Baxter and BNSF, the Washington Court of Appeals, Division I, under case number
11 54491-8-I, reversed that decision, and on October 31, 2006, the Washington Supreme Court
12 denied BNSF's petition for review.

13 2. BNSF and Baxter have asserted cross-claims against each other in this case and
14 in the State Court Action. To further Baxter's settlement objective of minimizing future
15 litigation costs, plaintiffs and Baxter requested that BNSF agree to dismiss with prejudice its
16 cross-claims against Baxter in this case and the State Court Action provided that: (1) Baxter also
17 would dismiss with prejudice its cross-claims against BNSF in this case and the State Court
18 Action; and (2) plaintiffs would assume responsibility, and provide BNSF with a proportionate
19 credit, for the equitable share or shares of liability, if any, attributable to Baxter (or to any of the
20 Baxter entities) in this case and the State Court Action. BNSF agreed to this request based on
21 the representations of Baxter's counsel that: (1) Baxter will cooperate fully in responding to
22 any BNSF discovery requests propounded to Baxter in this case or the State Court Action,
23 including providing access to Baxter personnel who may have information relevant to these
24 cases; and (2) Baxter has exhausted all insurance coverage and that there is no additional or
25 further potential coverage available for these cases.

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1 3. Plaintiffs have agreed to accept for their own account, for all purposes in this
2 case and in the State Court Action, the equitable share or shares of liability, if any, attributable
3 to Baxter (or to any of the Baxter entities). Plaintiffs agree that BNSF's liability, if any, to
4 plaintiffs will be reduced by the amount of the equitable share of liability, if any, allocated to
5 Baxter (or to any of the Baxter entities) in each case, in a manner consistent with the
6 Washington Model Toxics Control Act and other applicable law. The parties expressly
7 acknowledge that BNSF's execution of this Stipulation and Agreement is premised upon the
8 parties' agreement and intention that any and all damages or remedial action costs BNSF may
9 be ordered to pay plaintiffs in this case or the State Court Action shall be reduced by the
10 percentage of liability allocated to Baxter (or to any of the Baxter entities), if any, and not by
11 the dollar amount paid in settlement by Baxter to plaintiffs.

12 4. Based upon the foregoing, plaintiffs and BNSF hereby stipulate that all claims,
13 counterclaims, cross-claims, and any other claims, however asserted against Baxter, in this case
14 and the State Court Action should be dismissed with prejudice, without costs, and with each
15 party bearing its own attorneys' fees. Baxter hereby stipulates that all claims, counterclaims,
16 and cross-claims and any other claims, however asserted by Baxter against plaintiffs or BNSF,
17 in this case and the State Court Action should be dismissed with prejudice, without costs, and
18 with each party bearing its own attorneys' fees.

19 5. BNSF and Baxter agree that nothing in this stipulation and agreement shall be
20 deemed to be a waiver of any claim either party may have against the other in the event that a
21 third party, including any government agency, asserts a claim or brings an action in the future
22 concerning environmental contamination or natural resources damages associated with the
23 former Wyckoff West Seattle Wood Treating Plant (including adjacent offshore marine
24 sediments). Plaintiffs and Baxter agree that their settlement agreement will govern the rights
25 and obligations as between themselves regarding future third party claims and that this
26 stipulation will not alter or affect the terms of that settlement agreement.

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6. Plaintiffs, Baxter and BNSF hereby stipulate that the subjoined Order may be entered in the above-captioned court or this Stipulation and Agreement may be attached as an exhibit to an appropriate form of declaration or affidavit and filed in the State Court Action as circumstances may require.

7. This Stipulation may be executed in one or more counterparts, with each counterpart deemed an original, but all of which taken together shall constitute one and the same instrument.

Stipulated this 6th day of February, 2007.

FOSTER PEPPER PLLC

BULLIVANT HOUSER BAILEY PC

By /s/
Gillis E. Reavis, WSBA No. 21451
Attorneys for Plaintiffs

By /s/
Thomas D. Adams, WSBA No. 18470
Attorneys for Defendant BNSF

CASCADIA LAW GROUP PLLC

By /s/
Stephen J. Tan, WSBS No. 22756
Attorneys for Plaintiffs

LAW OFFICES OF JAMES C. HANKEN

By /s/
James C. Hanken, WSBA No. 1516
Attorney for Defendants Baxter Entities

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ORDER

Based on the foregoing stipulation of all parties, it is hereby ORDERED that: (1) all claims, counterclaims, and cross-claims asserted by or against J.H. Baxter & Co., a California limited partnership, J. H. Baxter & Co., a California corporation, and J.H. Baxter & Co., Inc., a California corporation (collectively Baxter), in the above-captioned matter shall be and are hereby dismissed with prejudice, without costs, and with each party bearing its own attorneys' fees; (2) any equitable share of liability attributable to these Baxter entities, or to any of them, shall be allocated to plaintiff Pacific Sound Resources; and (3) BNSF's liability, if any, to plaintiffs shall be reduced by the amount of the equitable share of liability allocated to Baxter, in a manner consistent with the Washington Model Toxics Control Act and other applicable law.

DATED this 8th day of February, 2007.


UNITED STATES DISTRICT JUDGE

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